



Social Mobility in the New Economy: Transforming Unpaid Internships through an Educational Inquiry Test

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Social Mobility in the New Economy: Transforming Unpaid Internships through an Educational Inquiry Test

Duncan Farthing-Nichol
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INTRODUCTION

The influence and legality of unpaid internships are the subjects of much impassioned commentary but little careful analysis. Arguments to abolish unpaid internships — that they are bar low- and moderate-income students from good careers and that they consist of demeaning chores — are intuitively appealing, yet based on anecdotes instead of data.¹ The counterarguments — that elimination would leave fewer opportunities for students of all incomes and that unpaid internships teach critical skills

¹ See, e.g., Andrew Mark Bennett, Note, *Unpaid Internships & The Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 UNIV. MD. L.J. RACE RELIGION GENDER & CLASS 293, 296-99 (2011); Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 2, 2010, <http://perma.cc/6D7K-GMDN>.

— are also unmoored from an empirical base.² The data pool on unpaid internships, small though it is, barely makes an appearance in the debate.

Analysis of the key legal question, whether an intern at a for-profit company is an employee under the Fair Labor Standards Act (“FLSA” or “the Act”) and so entitled to the minimum wage, suffers from a comparable lack of rigor. Media outlets, universities and self-proclaimed internship experts routinely mischaracterize the rules around unpaid internships, especially those at for-profit companies.³ Law review articles focus on the FLSA, the Supreme Court’s 1947 decision *Walling v. Portland Terminal Company*,⁴ and the Wage and Hour Division’s (“the Division”) Fact Sheet #71, which lays out the Division’s guidelines on when a for-profit employer can hire an intern without pay.⁵ Authors who touch on the essential line of lower court decisions most often stay at the surface, leaving unassessed the drivers of the judicial choices.⁶ Yet any reform short of amending the FLSA will have to fit within judicial thinking on unpaid work if it is to have a chance of success.

This Note employs available data and parses existing law to construct a new test to replace Fact Sheet #71. The Note argues that promulgating an educational inquiry test that asks courts to weigh unpaid, for-profit internships’ educational value under a set of proven metrics is the best method to make internships worthwhile. In judging educational value directly rather than through the current proxy of college approval, courts will give fuller meaning to *Portland Terminal* and serve the core judicial concern: to maintain unpaid internships in which the intern learns and flourishes while eliminating those in which the intern is only free labor.

Part I will explain the basic arguments against unpaid internships and present data to illuminate the merits of each. It will cite the little-known fact that most unpaid student interns are from moderate-income families, and discuss the significance of that fact for the pursuit of equality. Part II will outline the doctrine on the trainee exception and suggest that despite conflicting language, the common judicial approach is to rely on

² See, e.g., Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), <http://perma.cc/MD4Q-AKKY>; Matthew Yglesias, *Two Cheers for Unpaid Internships*, SLATE (Dec. 4, 2013, 12:22 PM), <http://perma.cc/Y3GL-BZN9>.

³ Jessica Curiale, Note, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 101, 115 (2010); see also Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME, May 2, 2012, <http://perma.cc/3TNK-Y8CM> (asserting that the Division’s six-factor test on the employee/intern distinction is part of the FLSA); Madeleine Overturf, *Unpaid Internships Aren’t the Problem – Working For Credit Is*, POLICYMIC (June 31, 2013), <http://perma.cc/S98N-8KX9> (claiming that the FLSA does not protect interns that receive college credit).

⁴ 330 U.S. 148 (1947).

⁵ See, e.g., Sarah Braun, Note, *The Obama “Crackdown:” Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281, 288-300 (2011-2012); Craig Durrant, Note, *To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 170, 172-79 (2013); Eric M. Fink, Note, *No Money, Mo’ Problems: Why Unpaid Law Firm Internships are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 445-49 (2013).

⁶ See Aaron D. Kaufmann and Elizabeth C. Morris, *Experience Pays, but Interns May Have to Be Paid for Their Experience: When Interns are Covered by Wage and Hour Laws*, 27 CAL. LAB. & EMP. L. REV., no. 6, 2013, at 3-4; Jessica A. Magaldi and Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184, 192-200 (2013); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 227-31 (2002); Bennett, *supra* note 1, at 302-08; Curiale, *supra* note 3, at 111-14.

school approval to decide if a person is an employee or a trainee. Part III will argue that financial incentives undercut colleges' ability to police the educational value of unpaid internships, and thus the Division should adopt a new test focused on direct assessment of educational quality. The remainder of Part III will describe how the new test fits within the doctrine. The Note will conclude with a call for more light and less heat on the topic of unpaid internships.

I. BY THE NUMBERS: EQUALITY AND EDUCATION IN UNPAID INTERNSHIPS

Modern internships have been around since the 1950s, but have only risen to prominence in the last twenty years.⁷ 60.5% of the approximately 1.8 million 2013 college graduates had at least one internship during their college years, the highest percentage since the National Association of Employers and Colleges began keeping track in 2007.⁸ Over the last few years, unpaid internships have made up about 48% of all internships and 38% of internships at for-profit companies.⁹

A. A Counterintuitive Impact on Equality

The characterization of unpaid internships as an attack on equal opportunity is perhaps the practice's most damning critique. Assailants argue that only students with wealthy parents can afford to work for free, particularly at summer-long positions far from home and campus. A student without financial means must apply only for paid internships, and if she fails to secure a position, she must abandon internships for work outside her field.¹⁰ Given that employers overwhelmingly cite internships as a key hiring factor for new graduates,¹¹ unpaid internships allow wealthy students to secure solid first rungs on the career ladder while leaving poorer students to struggle in a hostile job market.¹²

Despite its compelling narrative, the equal opportunity argument contains a faulty premise. A 2009 survey collected data from 5,735 college interns, 57% of whose families

⁷ ROSS PERLIN, *INTERN NATION* 32-36 (2011).

⁸ NAT'L ASS'N OF COLL. AND EMP'R, *THE CLASS OF 2013 STUDENT SURVEY REPORT 35* (2013); *Table 33, Projections of Education Statistics to 2021*, NATIONAL CENTER FOR EDUCATION STATISTICS, <http://perma.cc/DV3G-5KJ9> (last visited Jan. 13, 2013).

⁹ NAT'L ASS'N OF COLL. AND EMP'R, *supra* note 8, at 36; INTERN BRIDGE INC., *2012 INTERNSHIP SALARY REPORT 15* (2013).

¹⁰ Jim Frederick, *Internment Camp: The Intern Economy and the Culture Trust*, 9 *THE BAFFLER* 54, 55 (1997); Ben Yagoda, *Will Work for Academic Credit*, *CHRON. OF HIGHER ED.* (Mar. 21, 2008), <http://perma.cc/T8LR-BVQE>.

¹¹ MAGUIRE ASSOCIATES, *THE ROLE OF HIGHER EDUCATION IN CAREER DEVELOPMENT: EMPLOYER PERCEPTIONS 11* (2012) ("An internships is the single most important credential for recent college graduates to have on their resume in their job search among all industry segments..."); Aoun, *supra* note 2 (75% of employer want workers with applicable job experience, and more than 90% of employers favor past interns when making hiring decisions); Brian Burnsed, *Degrees Are Great, but Internships Make a Difference*, *U.S. NEWS* (Apr. 15, 2010), <http://perma.cc/FF8W-YGG8> ("[E]mployers almost universally maintain that partaking in an internship... before graduation is integral to finding meaningful employment in today's seemingly impenetrable job market.").

¹² Magaldi and Kolisnyk, *supra* note 6, at 206.

earned less than \$80,000 per year.¹³ Of the surveyed interns, 46% with family incomes below \$80,000 received no pay while only 40% with family incomes above \$80,000 interned for free.¹⁴ Sixty-two per cent of unpaid interns at nonprofit organizations, 61% in government agencies and 58% in the for-profit sector came from families earning below \$80,000.¹⁵ Sixty per cent of paid interns at nonprofit organizations, 60% in government agencies and 48% at for-profit companies came from families earning below \$80,000.¹⁶

These numbers call into question the argument that wealthy students gain an unfair career advantage through access to unpaid internships. In fact, eliminating unpaid internships could hurt moderate-income students more than their wealthier counterparts, especially those students with aspirations in the for-profit sector. A ban on unpaid internships would force companies to either begin paying their interns or annul their internship programs. Some employers would follow the lead of Atlantic Media (owner of *The Atlantic* magazine) and convert to paid internships, but others would take after Condé Nast (owner of *the New Yorker* and *Vanity Fair*, among others) and cancel their unpaid programs.¹⁷ Any decline in the supply of internships would increase the competition for each position still available, a competition in which wealthier students would have an advantage.¹⁸

Students without experience would need to take other measures to distinguish themselves, the most obvious of which is graduate school.¹⁹ As Matthew Yglesias has pointed out in *Slate*, the financial burden of four, eight or even twelve months of unpaid work pales in comparison to the incredible cost of graduate school.²⁰ Internship expenses are also small compared to most college tuition bills, which perhaps explains why moderate-income students take unpaid internships in such numbers.

The equal opportunity argument is incomplete. Reforms to the law of unpaid internships at for-profit companies must take into account the prevalence of moderate-income students in such internships and the likely consequences for those students should unpaid internships disappear.

¹³ PHIL GARDNER, COLLEGIATE EMPLOYMENT RESEARCH INSTITUTE, A COMPARISON OF CREDIT AND NON-CREDIT INTERNSHIPS IN THEIR EXPECTATIONS AND THE UTILIZATION OF CAMPUS RESOURCES 19 (2012).

¹⁴ PHIL GARDNER, INTERN BRIDGE INC., THE DEBATE OVER UNPAID COLLEGE INTERNSHIPS 6 (2010).

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ Atlantic Media switched to a paid internship program after learning about the muddled legality of unpaid internships at for-profit companies. Jeff Bercovici, '*Atlantic*' Publisher Takes Stand on Intern Pay. *Who Will Follow?*, DAILY FINANCE (Apr. 12, 2010), <http://perma.cc/4J6V-B3PD>. Condé Nast cancelled its internship program after two former unpaid interns filed suit for back wages under the FLSA. Akane Otani, *Former interns upset by end of Condé Nast internships*, USA TODAY (Oct. 29, 2013, 8:24 PM), <http://perma.cc/RE34-Y8J3>. Other employers have also limited their unpaid programs in response to legal threat or uncertainty. Hilary Stout, *The Coveted but Elusive Summer Internship*, N.Y. TIMES, July 2, 2010, <http://perma.cc/9LSU-APM4>.

¹⁸ See, e.g., GARDNER (2012), *supra* note 13, at 9, 21 (noting that wealthier students, especially those whose families earn more than \$120,000, receive great help from networks of friends and family in the internship search).

¹⁹ Yglesias, *supra* note 2.

²⁰ *Id.*

B. Educational Value under Unsteady Oversight

The popular image of an unpaid intern is one of scattered coffee making and paper filing. Indeed, some interns toil at menial tasks: they run clothing across town for fashion magazines, greet guests and speakers at conferences, and mail hats back and forth over the Atlantic.²¹ Yet not all internships are so superficial: many unpaid interns do substantive work, penning articles for newspapers and researching stories for magazine writers.²² Overall, unpaid internships lag somewhat behind their paid cousins in professional assignments: in 2011, paid interns at for-profit entities spent 44% of their time on professional duties and 24% on clerical duties, while unpaid interns spent 33% of their time on professional duties and 31% on clerical duties.²³

The content requirements on unpaid internships, to the extent that they exist, flow predominantly from colleges. The Wage and Hour Division could police an educational minimum, but it has done little to enforce the law.²⁴ Students, as one-off players with limited information and precarious career positions, are unlikely to either select for educational quality or complain about poor experiences.²⁵ Colleges, on the other hand, are well-established repeat players, with significant influence over the talent pipeline and a powerful lever in the form of college credit.

Sixty-two per cent of unpaid interns secure college credit, many because for-profit employers believe credit obviates FLSA liability.²⁶ That belief is a tool in the hands of colleges, who could withhold credit from internships that have little educational content. However, relatively few colleges take the opportunity. In 2009, only 39% of unpaid, credit interns were in regular contact with or received a site visit from a campus representative during their internships.²⁷ Only 50% of a small sample of colleges “actively put measures in place to monitor the quality of unpaid internships” (another 20% of respondents did not know if their colleges had such measures).²⁸ It is difficult to tell whether the average school diligently oversees the educational quality of unpaid, for-profit internships, but at best, colleges provide inconsistent supervision.

²¹ Steve Cohen, *Minimum Wage for Interns? It Misses the Point*, WALL ST. J., Jan. 7, 2013, <http://perma.cc/XE8C-E4RQ>; Sanburn, *supra* note 3; Kaitlin van Baarle, *The precarious life of kids these days: the unpaid internship industry*, INTERN AWARE (Apr. 26, 2013), <http://perma.cc/WSL4-X84Q>.

²² Cara Buckley, *Sued over Pay, Condé Nast Ends Internship Program*, N.Y. TIMES, Oct. 23, 2013, <http://perma.cc/B4GQ-ST5S>; Connie Sung, *Are Unpaid Internships Exploitive?*, L.A. TIMES, Dec. 30, 2000, <http://perma.cc/7UGX-K7H8>.

²³ NAT’L ASS’N OF COLL. AND EMP’R, THE CLASS OF 2011 STUDENT SURVEY REPORT 42 (2011).

²⁴ Bennett, *supra* note 1, at 308-10 (documenting the Division’s lack of enforcement against illegal unpaid internships).

²⁵ See Yamada (2002), *supra* note 6, at 232 (arguing that interns may refrain from complaining to avoid souring their chances for a reference or job offer down the road); Glaeser, *supra* note 2 (pointing out that students need more information on educational quality);.

²⁶ INTERN BRIDGE INC. (2013), *supra* note 9, at 84; see also Stout, *supra* note 17 (“Most employers aren’t entirely eliminating their unpaid internship programs but are instead becoming sticklers, requiring that schools grant credit to any person they hire for an unpaid internship.”); Yagoda, *supra* note 10 (writing that almost all employers require unpaid interns to receive academic credit because the employers believe such credit eliminates minimum wage liability).

²⁷ GARDNER (2012), *supra* note 13, at 23.

²⁸ PHIL GARDNER, INTERN BRIDGE INC., REACTION ON CAMPUS TO UNPAID INTERNSHIP CONTROVERSY 7 (2012).

Collegiate inconsistency may contribute to the most striking figures on unpaid internships: while 67% of 2013 seniors who completed a paid, for-profit internship had received at least one job offer prior to graduation, only 37% of unpaid, for-profit interns received a job offer — little different from the 35% of non-intern seniors with a job offer.²⁹ Even more damning, a senior with a paid internship under her belt pegged a median starting salary of \$51,930 while the unpaid intern secured only \$35,721, *less than* the non-intern's median starting salary of \$37,087.³⁰

The National Association of Colleges and Employers has cautioned analysts from taking the figures too much to heart, most notably because the data only discuss job offers earned prior to graduation; unpaid internships may still have a positive impact post-graduation.³¹ Diagnosing the discrepancy's source may be impossible without more information, but that has not stopped advocates from citing the data to claim that unpaid internships are both exploitative *and* useless, and so students would lose nothing if they disappeared.³²

Yet students overwhelmingly find value in internships, even unpaid internships.³³ When researchers actually ask students what they think of internships, they give very favorable reports³⁴ and often express the opinion that internships are better educational tools than classes.³⁵ Eradication seems at odds with such approval.

If unpaid internships are in fact failing to offer an immediate benefit in the job market, the law may respond in one of two ways: devise a legal rule that will eliminate unpaid internships or design a test to improve the quality of unpaid internships. While many writers have taken the first option,³⁶ it is fraught with risk: extinguishing unpaid

²⁹ NAT'L ASS'N OF COLL. AND EMP'R, *supra* note 8, at 38.

³⁰ *Class of 2013: Paid Interns Outpace Unpaid Peers in Job Offers, Salaries*, NAT'L ASS'N OF COLL. AND EMP'R (May 29, 2013), <http://perma.cc/EUD6-G9X8> (data is not available solely on interns at for-profit entities).

³¹ *Unpaid Internships: A Clarification of NACE Research*, NAT'L ASS'N OF COLL. AND EMP'R (Oct. 16, 2013), <http://perma.cc/588X-HYE2>.

³² Jordan Weissmann, *Do Unpaid Internships Lead to Jobs? Not for College Students*, ATLANTIC (June 19, 2013, 8:30 AM), <http://perma.cc/VW4P-65S5>; Andrew Maguire, *Unpaid Internships: Get on the Right Side of History*, INTERNMATCH.COM (Apr. 11, 2013), <http://perma.cc/LFG2-PAW5>.

³³ See, e.g., Fred Beard and Linda Morton, *Effects of Internship Predictors on Successful Field Experience*, 53 JOURNALISM & MASS COMM. EDUCATOR 42, 48, 49 (1999) (finding that advertising and public relations interns "evaluated their internships very highly" and compensation did not play a large role in that assessment); Daniel J. Givelber et al., *Learning Through Work: An Empirical Study of Legal Internship*, 43 J. LEGAL EDUC. 1, 24, 41 (1995) (finding that "[m]ost students rated their internships extremely positively as educational experiences" and that compensation was not significantly related to intern ratings of educational quality).

³⁴ See, e.g., Sherry Cook et al., *The Perceptions of Interns: A Longitudinal Case Study*, 79 J. ED. FOR BUS. 179, 184 (2004) (finding that interns overwhelmingly found value in their internships); Debbie A. D. C. Jaarsma et al., *Undergraduate research internships: Veterinary students' experiences and the relation with internship quality*, 31 MED. TCHR. 178, 180 (2009) (reporting high satisfaction among veterinary interns); Thomas P. Schambach and Jim Dirks, *Student Perceptions of Internship Experiences*, INT'L CONF. ON INFORMATICS ED. RES. 1, 5 (2002) (noting that 96% of computing students agreed or strongly agreed that their internship provided "valuable real-world experience").

³⁵ See, e.g., Jack Gault et al., *Undergraduate Business Internships and Career Success: Are They Related?*, 22 J. MARKETING ED. 45, 49-50 (2000) (finding that interns viewed five core skills as better learned in an internship than in university and only one core skill better learned in university than in an internship).

³⁶ The tests in the following articles would eliminate all but a very few unpaid internships. KATHRYN ANNE EDWARDS AND ALEXANDER HERTEL-FERNANDEZ, *ECON. POL'Y INST., NOT-SO-EQUAL PROTECTION*

internships would likely deny experiential education opportunities to a great many moderate-income students, despite the demand for and benefits of such an education. The other option, the one proposed in this Note, is to regulate the educational value of unpaid internships in an attempt to raise their quality closer to that of paid internships. The next Part will explore the law one must navigate to write a legal test that will both guarantee educational quality and stand up in court.

II. UNPAID INTERNSHIPS UNDER THE FLSA

A. *The Fair Labor Standards Act of 1938*

On June 25, 1938, after a marathon Congressional battle and under the shadow of a Supreme Court only recently tolerant of a minimum wage, President Roosevelt signed the Fair Labor Standards Act into law.³⁷ The Act set a minimum wage of \$0.25 per hour (rising to \$0.40 by 1945), fixed maximum hours of 44 per week (falling to 40 by 1940), and banned child labor.³⁸ Today, the Act provides for a minimum wage of \$7.25 per hour.³⁹

The FLSA's minimum wage requirements only apply to employees, and so the key FLSA question for unpaid interns is whether they are employees. An employee is "any individual employed by an employer."⁴⁰ An employer, in turn, "includes any person acting... in the interest of an employer in relation to an employee," while to employ is "to suffer or permit to work."⁴¹ Despite the breadth of that last definition, the courts have found it proper to carve out unenumerated exceptions to the Act's coverage by excluding some workers from employment. One of those exceptions, *Walling v. Portland Terminal Co.*'s "trainee" exception,⁴² forms the basis of unpaid intern law under the FLSA.

B. *Walling v. Portland Terminal Company*

Portland Terminal Company employed yard brakemen to operate a railway yard.⁴³ To train new brakemen, the railroad assigned job applicants to work crews, where an applicant learned his duties first by observation and then by actual operation under the watchful eye of a regular brakeman.⁴⁴ The length of the training course depended on the

REFORMING THE REGULATION OF STUDENT INTERNSHIPS 4 (2010) (pitching a test under which the unpaid intern is an employee if the employer's financial benefit is greater than its financial cost); Curiale, *supra* note 3, at 122 (proposing, under a mistaken view of the Division's formal rulemaking powers, a Division rulemaking to convert the six-factor test into an all-or-nothing test with *Chevron* deference); Durrant, *supra* note 5, at 187-88 (suggesting that an unpaid intern should be an employee whenever the employer seeks a present or future benefit from the intern).

³⁷ Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L. J. 715, 718, 720-21 (1988).

³⁸ *Id.* at 721; Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, 101 MONTHLY LAB. REV. 22, 28 (1978).

³⁹ Fair Labor Standards Act, 29 U.S.C. §206(a)(1)(C) (2013).

⁴⁰ 29 U.S.C. §203(e)(1).

⁴¹ 29 U.S.C. §203(d), (g).

⁴² 330 U.S. 148 (1947).

⁴³ *Id.* at 149.

⁴⁴ *Id.*

aptitude of the trainee, but successful students took seven or eight days on average to complete the training.⁴⁵ The railroad did not pay trainees during the training period, though as of October 1943 it paid a retroactive wage of four dollars per day to trainees who earned certification and joined the list of available brakemen.⁴⁶

The Court decided that the trainees were not ‘employees’ under the FLSA and so were not entitled to the minimum wage during the training period,⁴⁷ though the Court was not clear as to which factors led to that determination. The Court noted that the trainees did not displace employed brakemen, as brakemen closely supervised trainee tasks.⁴⁸ The railroad never promised and the trainees never expected any compensation, important since the Act aimed to guarantee a minimum wage in positions that “contemplated compensation.”⁴⁹ The railroad’s training program was similar to that offered in a vocational school, yet schools do not owe their students a wage.⁵⁰ Rather than assist the company, the trainees “may, and sometime do[], actually impede and retard” the company’s work, presumably due to their inexperience.⁵¹ Indeed, that lack of assistance may have been dispositive: “Accepting... that the railroads receive no ‘immediate advantage’ from any work done by the trainees, we hold that they are not employees within the Act’s meaning.”⁵²

The assorted factors and their relative weights have garnered the most attention in separating employees from trainees. Yet the spirit of the opinion is best captured in the line, “But broad as [the definitions of ‘employ’ and ‘employee’] are, they cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”⁵³ The Court conceived of an exception wherein employers who sought not to elude the law but to educate novices without charge could avoid liability for such admirable behavior.⁵⁴ In the years following, however, and despite good intentions, the Wage and Hour Division and the lower courts turned the sensible exception into an exploitable loophole.

C. Fact Sheet #71

Since at least 1967, the Wage and Hour Division has said that a person is not an employee under the FLSA if her work relationship meets six criteria derived from *Portland Terminal*.⁵⁵ In some early applications of the six-factor trainee test, the Division appeared to hold the position that even one missing factor produced an employment relationship under the Act⁵⁶ — a rigid stance that might have severely curtailed the

⁴⁵ *Id.*

⁴⁶ *Id.* at 150.

⁴⁷ *Id.* at 153.

⁴⁸ *Id.* at 150.

⁴⁹ *Id.* at 150, 152.

⁵⁰ *Id.* at 152-53.

⁵¹ *Id.* at 150.

⁵² *Id.* at 153.

⁵³ *Id.* at 152.

⁵⁴ *Id.* at 153.

⁵⁵ *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993) (noting the test’s use since at least 1967); WAGE AND HOUR DIVISION, FIELD OPERATIONS HANDBOOK 10b11 (1993) (the same test).

⁵⁶ *See, e.g.*, Wage and Hour Division, Op. Ltr., Oct. 7, 1975 (“Where all six of the criteria are not met, the students or trainees will be regarded as employees. This would be true, for example, where the student has

relevance of the trainee exception to internships. In other applications, however, the Division retained the flexibility of a totality-of-the-circumstances approach, permitting a more subjective determination of when people can work for free.⁵⁷ In April 2010, the Division released Fact Sheet #71, which laid out the six-factor test for interns in almost identical language to that of the trainee test (not much of a surprise, as the Division had applied the trainee test to interns for decades⁵⁸).⁵⁹ Under the Division's interpretation, an unpaid intern at a for-profit company⁶⁰ is not an employee under the FLSA if:

- 1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
- 2) The internship experience is for the benefit of the intern;
- 3) The intern does not displace regular employees, but works under close supervision of existing staff;
- 4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- 5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
- 6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁶¹

The Fact Sheet does little to clarify whether the failure to meet a single factor will result in classification as an employee. On the one hand, the Fact Sheet notes that, "The determination of whether an internship or training program meets [the trainee] exclusion depends on all of the facts and circumstances of each such program."⁶² On the other hand, the Fact Sheet closes the test by writing that, "If all of the factors listed above are met, an employment relationship does not exist under the FLSA" — hinting at an all-or-nothing approach in which the absence of even one factor is dispositive.⁶³

been promised a job at the conclusion of the training program."); Wage and Hour Division, WH-20, Op. Ltr., Feb. 22, 1974 ("If all of the following criteria apply, the trainees are not considered employees within the meaning of the Act.").

⁵⁷ See, e.g., Wage and Hour Division, Op. Ltr., May 1, 1996 (If all of the [six] criteria are met, an employer would not be required to pay wages to a trainee enrolled in a training program. If, however, some of the above criteria are not met, it is still possible that a trainee would not be an employee under the FLSA; however, all of the facts and circumstance would have to be considered.").

⁵⁸ See Wage and Hour Division, Op. Ltr., Mar. 27, 1986 (firefighting interns).

⁵⁹ WAGE AND HOUR DIV., DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2010), available at <http://perma.cc/JR5Q-G2KL>.

⁶⁰ Fact Sheet #71's footnote reads: "Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." *Id.* at 1. The law of volunteers in the public and non-profit sectors is beyond the scope of this Note. For an analysis, see Anthony J. Tucci, Note, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363 (2012). This Note discusses the law of the trainee exception, the only exception under which an unpaid interns at for-profit company may fall.

⁶¹ FACT SHEET #71, *supra* note 59, at 1.

⁶² *Id.*

⁶³ *Id.*

In practice, the Division's choice of approach depends on the blessing of an educational institution.⁶⁴ The Fact Sheet's commentary on the educational environment factor notes that the Division will often classify an internship "as an extension of [an] individual's educational experience" rather than a job when "a college or university exercises oversight over the internship program and provides educational credit."⁶⁵ That commentary applies to only the first factor in the test, and the Fact Sheet goes on to emphasize other factors: the restriction on "productive work," the ban on employee displacement and the requirement of extra supervision, among others.⁶⁶ However, as demonstrated below, those latter criteria only become the subjects of searching inquiry when no educational institution has sanctioned the work arrangement. When, instead, an internship has academic backing, the Division conducts a cursory analysis, relying on the school to ensure legitimacy. The Division, *de facto*, has two tests: a stringent one for internships without a link to a school, and a lax one for those with such a link.

D. Wage and Hour Opinion Letters

To demonstrate the pattern in the Division's analysis, this section reviews selected opinion letters from a search for those that include the word "trainee."⁶⁷ The Division scrutinizes adherence to the six factors in work relationships without an academic link. In a letter to a food service training program for people with disabilities, the Division detailed the program's failure to meet criteria three (no displacement of regular employees), four (no immediate advantage), and six (understanding that position is unpaid).⁶⁸ In another case, the Division examined a summer program that aimed to build employment skills in low-income youth, asking for specifics on the supervision and educational benefits of the program.⁶⁹

In inspecting work relationships with an academic link, however, the Division often approves non-payment of wages after only a cursory analysis. For example, the Division received a letter describing a firm's plan to host interior design students for ninety to one hundred hours of supervised work, completion of which was a requirement for graduation.⁷⁰ In response, the Division wrote that it would "not assert that a student studying to become an interior designer is an employee of a firm when engaged in on-the-job training or work experience which is a prescribed part of the curriculum."⁷¹ In another case, the Division stated that a corporate law office did not have to pay students

⁶⁴ David Yamada has noted that the Division's analysis is more favorable to internships connected to academic programs. Yamada (2002), *supra* note 5, at 229-230. See also Debra D. Burke and Robert Carton, *The Pedagogical, Legal, and Ethical Implications of Unpaid Internships*, 30 J. LEGAL STUD. ED. 99, 113 (2013) ("[O]pinion letters... indicate that... an internship with school sponsorship that awards academic credits, is less likely to be accorded employee status.").

⁶⁵ FACT SHEET #71, *supra* note 59, at 2.

⁶⁶ *Id.*

⁶⁷ The author searched the Westlaw database, which includes some opinion letters from January 1970 and all opinion letters from 1989 to 2009 (when the Division stopped writing FLSA letters). The author reviewed all letters in the database that include the word "trainee."

⁶⁸ Wage and Hour Division, Op. Ltr., Jan. 17, 1986.

⁶⁹ Wage and Hour Division, FLSA2002-8, Op. Ltr., Sept. 5, 2002.

⁷⁰ Wage and Hour Division, WH-20, Op. Ltr., Mar. 31, 1970.

⁷¹ *Id.*

taking part in an externship program but would have to pay graduates working in the exact same program.⁷²

The Division does not automatically approve every program connected to a school. For example, it rejected a claim that unpaid sewing machine students who produced glove inserts were trainees of a glove-manufacturing firm.⁷³ However, the Division's concluding lines in response to this egregious violation were far from damning: "We have assisted many communities in complying with the above guidelines while using vocational schools to create reservoirs of trained manpower. We are certain that, with only a few changes in the vocational program, [the firm] will be able to use its schools in its industrial development program."⁷⁴

Other school-connected initiatives have earned inspection: in 2004, the Division examined and rejected a marketing program that would have seen unpaid college students wearing company logos, surveying fellow students, distributing flyers and forecasting trends, all for college credit and under faculty supervision.⁷⁵ Despite some inconsistency, however, the Division shows a marked leniency toward those work relationships with a connection to an educational institution. That leniency has its fullest expression among the lower courts, where an institutional link almost without exception buys a pass on the minimum wage.

E. In the Lower Courts

Although the courts speak in terms of a contest between the six-factor test and a primary benefit test in deciding unpaid work cases under the FLSA,⁷⁶ that contest is an illusion. In fact, the core determinant is the involvement of an educational institution; once that factor comes into view, the apparent circuit split disappears.⁷⁷ The reliance on academic institutions has significant ramifications for the future development of the law and for the possibilities for reform. This section reviews selected cases from a comprehensive search of all FLSA cases in which the court analyzed a work placement's educational benefits to decide if a person was an employee.

In 1998, then-District Court Judge Sonia Sotomayor held that homeless and formerly homeless people participating in an employment experience program were

⁷² Wage and Hour Division, Op. Ltr., Jan. 28, 1988.

⁷³ Wage and Hour Division, Op. Ltr., Feb. 22, 1974.

⁷⁴ *Id.*

⁷⁵ Wage and Hour Division, FLSA2004-5NA, Op. Ltr., May 17, 2004; *See also* Wage and Hour Division, Op. Ltr., Dec. 6, 1994 (evaluating the possibility of an immediate advantage to the hosts of at-risk students in a public school program); Wage and Hour Division, Op. Ltr., Oct. 7, 1975 (giving guidance on the level of supervision, length of job placement and work complexity permitted in a high school career experience program).

⁷⁶ *See, e.g.,* Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518, 525-29 (6th Cir. 2011); Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 531-32 (S.D.N.Y. 2013); Reich v. Shiloh True Light Church of Christ, 895 F.Supp. 799, 817-18 (W.D.N.C. 1995).

⁷⁷ For assertions of a circuit split, see, for example, David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, NORTHEASTERN UNIV. L.J. (forthcoming) (manuscript at 9-10) ("[I]t appears inevitable that there will remain splits among the federal circuits on [the unpaid intern question]."); Bennett, *supra* note 1, at 305 ("The courts have not defined a single clear test to determine whether a person is an employee."); Curiale, *supra* note 3, at 117 (noting the "circuit split" among trainee cases).

employees under the FLSA.⁷⁸ The program, designed to build a work history and job skills, placed participants in entry-level jobs inside and outside the employer's social service facility.⁷⁹ Though "[t]here is no doubt that the [program] participants... benefitted enormously from the work opportunities provided by the [non-profit employer]," the employer's cost-savings and profits on outside contracts outweighed the participants' gains.⁸⁰ The court appreciated "the attractive nature of the [employer's] program in serving the needs of the homeless," but it could not stand absent a minimum wage.⁸¹

In cases of academic endorsement, on the other hand, courts uncritically credit the employer's assertion of educational value and trivialization of its own benefit. The Sixth Circuit in the 2011 case *Solis v. Laurelbrook Sanitarium and School*⁸² decided that high school students engaged in revenue-generating tasks at a religious boarding school were not employees.⁸³ Laurelbrook students grew flowers, fixed cars, and performed medical services in the sanitarium, all activities from which Laurelbrook derived income.⁸⁴ However, the court found that the students' practical training, high level of supervision, inculcation of discipline and other "intangible" benefits, and "opportunity to obtain [a hands-on] education in an environment consistent with their beliefs" overrode the school's monetary profit.⁸⁵

*Marshall v. Regis Educational Corporation*⁸⁶ dealt with student resident assistants ("RAs") at a private college who undertook administrative jobs, kept order in the resident halls, encouraged residents to take part in campus activities, and offered peer counselling in exchange for a \$1,000 tuition grant and lower rent.⁸⁷ The Department of Labor argued that the "RA's were employees because their services had an immediate economic impact on the 'business' of operating a college."⁸⁸ The Tenth Circuit thought that perspective "so limited as to ignore not only the broad educational purpose of this private liberal arts college, but also the expressed educational objectives of the student resident assistant program."⁸⁹ Without explaining what those educational objectives might be, the court held that the RAs were not employees under the FLSA.⁹⁰

Though most cases fall along the educational institution dividing line, a few, such as *Marshall v. Baptist Hospital, Inc.*,⁹¹ do not. The *Baptist Hospital* court found that radiology students who undertook a two-year training program of courses and practical

⁷⁸ *Archie v. Grand Cent. Partnership, Inc.*, 997 F.Supp. 504, 535 (S.D.N.Y. 1998). For related findings of employment, see *Wirtz v. Wardlaw*, 339 F.2d 785 (4th Cir. 1964); *Bailey v. Pilots' Ass'n for the Bay and River Del.*, 406 F.Supp. 1302 (E.D. Pa. 1976).

⁷⁹ *Archie*, 997 F.Supp. at 509-10, 535.

⁸⁰ *Id.* at 533, 535.

⁸¹ *Id.* at 508.

⁸² 642 F.3d 518 (6th Cir. 2011). For related findings of no employment, see *Blair v. Wills*, 420 F.3d 823 (8th Cir. 2005); *Lane v. Carolina Beauty Sys., Inc.*, No. 6:90CV00108, 1992 WL 228868 (M.D.N.C. July 2, 1992); *Bobilin v. Bd. of Educ., State of Haw.*, 403 F.Supp. 1095 (D. Haw. 1975).

⁸³ *Laurelbrook*, 624 F.3d at 532.

⁸⁴ *Id.* at 530.

⁸⁵ *Id.* at 531-32.

⁸⁶ 666 F.2d 1324 (10th Cir. 1981).

⁸⁷ *Id.* at 1026.

⁸⁸ *Id.* at 1027.

⁸⁹ *Id.* at 1027.

⁹⁰ *Id.* at 1028. *But cf.* *Marshall v. Marist College*, 1977 WL 869 (S.D.N.Y. 1977) (finding that RAs in very similar circumstances were employees under the FLSA).

⁹¹ 473 F.Supp. 465 (M.D. Tenn. 1981), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981).

experience at a hospital were employees.⁹² The court cited the basic absence of supervision, the lack of rotation between different procedures, the routine nature of many tasks, and the enormous quantity of clerical work as aspects of a “deficient” training program.⁹³ But *Marshall* is an outlier in its criticism and rejection of a program connected to a school.

Unpaid internships finally made it into FLSA decisions in 2012 and 2013, yet despite the media buzz⁹⁴ around *Glatt v. Fox Searchlight Pictures Inc.*,⁹⁵ the new cases did not alter the basic pattern of analysis. Eric Glatt and Alex Footman carried out administrative jobs for the film *Black Swan*, handling paychecks, writing cover letters, and answering phones.⁹⁶ No party alleged an academic connection; in fact, both interns had already graduated from college.⁹⁷ In applying the six-factor test to decide that Glatt and Footman were employees, the court insisted on a high standard of educational validity: “[t]he benefits [the interns] may have received... are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer.”⁹⁸

*Kaplan v. Code Blue Billing & Coding, Inc.*⁹⁹ illustrated the continued vitality of the educational connection. Risa Kaplan and Linda O’Neill took unpaid internships¹⁰⁰ at for-profit employers to fulfill the internship requirement of their Medical Billing and Coding Specialist program.¹⁰¹ In a perfunctory opinion with little factual analysis, the Eleventh Circuit dismissed the value of the interns’ activity and emphasized the benefits of “academic credit” and “[satisfaction of] a precondition of graduation.”¹⁰² In a review of summary judgment against the interns, the court noted that, “[a]lthough Kaplan and O’Neill argue that their [internship] experiences were of little educational benefit, they did in fact engage in hands-on work for their formal degree program.”¹⁰³

The Southern District of Florida made an even stronger statement on the relevancy of an academic connection in *Demayo v. Palms West Hospital, Limited Partnership*.¹⁰⁴ The *Demayo* court decided that Toni Demayo, a surgical technologist

⁹² *Id.* at 467, 469-71.

⁹³ *Id.* at 467, 474-76.

⁹⁴ See, e.g., Tovia Smith, *Unpaid No More: Interns Win Major Court Battle*, NPR (June 13, 2013), <http://perma.cc/LBT2-MEGR> (claiming that *Glatt* “may have broad implications”); Jordan Weissman, *The Court Ruling That Could End Unpaid Internships for Good*, ATLANTIC (June 12, 2013), <http://perma.cc/DSQ9-LWLZ> (noting that while only a single ruling from a trial judge, *Glatt* “might still symbolize the tipping point in the battle over unpaid internships”).

⁹⁵ 293 F.R.D. 516 (S.D.N.Y. 2013).

⁹⁶ *Id.* at 533.

⁹⁷ *Id.* at 526-27; Memorandum of Law in Support of Defendants’ Motion for Summary Judgment at 11, *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 11 Civ. 6784).

⁹⁸ *Glatt*, 293 F.R.D. at 534.

⁹⁹ 504 Fed.Appx. 831 (11th Cir. 2013).

¹⁰⁰ The parties and the court describe the placements as externships. However, common parlance defines externships as job shadowing opportunities and internships as substantive positions. Nathan Parcells, *Externship v. Internship*, INTERNMATCH BLOG (Oct. 3, 2011), <http://perma.cc/HX5H-SXSF>. Since no party disputes that Kaplan and O’Neill performed actual tasks, this Note describes them as interns rather than externs. For the same reason, the Note also describes Demayo as an intern.

¹⁰¹ *Kaplan*, 504 Fed.Appx. at 833-34.

¹⁰² *Id.* at 835.

¹⁰³ *Id.* at 834.

¹⁰⁴ 918 F.Supp.2d 1287 (S.D. Fla. 2013).

student completing an unpaid internship required for her degree, was not an employee.¹⁰⁵ Compared to the *Glatt* court's demands, the court in *Demayo* set a very low educational threshold:

The gist of Plaintiff's argument to the contrary rests in the fact that she performed nonsurgical work, such as stocking instruments and supplies, organizing files, and taking out the garbage.... While this type of work may, generally, be the type of work covered by the FLSA, it is part-in-parcel to the tasks a surgical technologist performs. And, the central purpose of Plaintiff's externship was to perform the work of a surgical technologist—that is, of course, the very reason she attended [her college].¹⁰⁶

This survey excluded cases in which the unpaid time consisted of training for a paid job to begin immediately or shortly after the training. Cases such as *Donovan v. American Airlines, Inc.*¹⁰⁷ and *Reich v. Parker Fire Protection District*¹⁰⁸ have been central to unpaid internship scholarship¹⁰⁹ and shed light on judicial treatment of the Division's six-factor test, but they do not reveal courts' central concerns in unpaid work placements like internships. Conventional training programs are easy cases — the trainees do not displace employees, do not perform productive work, and often receive training in a classroom — and courts most often find no employment relationship.¹¹⁰ Work placements such as internships, where productive contribution in a job setting is the norm and often the point, are much more difficult to classify under the FLSA.

No court grounds its opinion explicitly in an academic connection or lack thereof. The significance of the factor emerges only through the results, the styles of analysis, and the swings in the judicial attitude perceptible across a full collection of the cases. But while subtle in its expression, the deference accorded to the academy is profound: a wide gulf separates *Glatt*'s exacting verdict that the internships were “a far cry from *Walling* [*v. Portland Terminal*]” from *Kaplan*'s wholly conclusory review.¹¹¹

III. AN EDUCATIONAL INQUIRY TEST

A. Educational Value, the Underlying Metric

The source of schools' sway over the legality of unpaid internships lies in administrative and judicial concern over educational value. Several Division opinion letters note that the Division will not assert an employment relationship in a school-

¹⁰⁵ *Id.* at 1288, 1292.

¹⁰⁶ *Id.* at 1292.

¹⁰⁷ 686 F.2d 267 (5th Cir. 1982) (training course for potential flight attendants and reservation sales agents).

¹⁰⁸ 992 F.2d 1023 (10th Cir. 1993) (training course for potential firefighters).

¹⁰⁹ *See, e.g.*, Yamada (2002), *supra* note 6, at 230-31; Curiale, *supra* note 3, at 112-13.

¹¹⁰ *See, e.g.*, *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947); *Parker Fire Protection District*, 992 F.2d at 1029; *American Airlines*, 686 F.2d at 272. *But see* *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (deciding that unpaid persons who spent a week in training for a snack delivery job by assisting snack delivery workers were employees).

¹¹¹ *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 Fed. Appx. 831, 835 (11th Cir. 2013); *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013).

sanctioned internship if the internship offers “professional experience in the furtherance of [the students’] education,”¹¹² “involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting.”¹¹³ The *Regis* court repeatedly noted the “educational benefits” of the resident assistant program,¹¹⁴ while the *Baptist Hospital* court laid out in great detail five reasons that the radiology training program was not educationally valid.¹¹⁵ In *Demayo*, the court relied on the instructional worth of the comprehensive technologist experience to find that the student was not an employee.¹¹⁶ The Division and the courts believe that unpaid placements of educational quality are valuable and deserve an exception from the FLSA.

Administrative and judicial decision-makers are not experts in education, however, and so put their faith in academic institutions. Though they do not say so directly, decision-makers’ favor for internships with an academic connection appears to stem from the theory that schools are better placed to judge educational merit. If an internship has the blessing of a college, it must be worthwhile, and so it will receive only minor scrutiny under the FLSA. If an internship does not have such approval, however, it is suspect and must withstand the rigors of close administrative or judicial analysis. The significance of the school connection thus springs from good intentions on the part of the Division and the courts: it is an attempt to put the judgment of educational value in the hands of those best able to make it.

B. Skewed Academic Incentives

The Division and the courts, however, should not rely on a third party that has a financial interest in promoting unpaid internships. Many colleges have pecuniary motivations in deciding whether to approve unpaid internships: of the interns that received credit in a 2009 survey, 76% paid tuition for those credits.¹¹⁷ Colleges, whether public, private non-profit or private for-profit, reap rewards when they earn tuition dollars that demand little or no expenditure. Public or private, more money means higher salaries, expanded campuses, better programs and greater status. The temptation interferes with the educational judgment on which the Division and the courts count.

The backgrounds of *Kaplan* and *Demayo* furnish a dramatic example of scholarly greed at a for-profit institution. Kaplan and O’Neill attended the MedVance Institute’s Medical Billing and Coding Specialist program, while Demayo completed the surgical technologist program at MedVance.¹¹⁸ MedVance is a for-profit college that recently changed its name to the Fortis Institute upon joining the Fortis network.¹¹⁹ In 2012, the

¹¹² Wage and Hour Division, Op. Ltr., May 8, 1996; Wage and Hour Division, Op. Ltr., July 11, 1995; Wage and Hour Division, Op. Ltr., Jan. 28, 1988.

¹¹³ Wage and Hour Division, Op. Ltr., May 8, 1996; Wage and Hour Division, Op. Ltr., July 11, 1995.

¹¹⁴ *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1327 (10th Cir. 1981).

¹¹⁵ *Marshall v. Baptist Hosp., Inc.*, 473 F.Supp. 465, 474-76 (M.D. Tenn. 1981), *rev’d on other grounds*, 668 F.2d 234 (6th Cir. 1981).

¹¹⁶ *Demayo v. Palms West Hosp., Ltd. P’ship*, 918 F.Supp.2d 1287, 1292 (S.D. Fla. 2013).

¹¹⁷ GARDNER (2012), *supra* note 13, at 19.

¹¹⁸ *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 Fed. Appx. 831, 832 (11th Cir. 2013); *Demayo*, 918 F.Supp.2d at 1288.

¹¹⁹ *Fortis Institute in Port St. Lucie*, FORTIS, <http://perma.cc/3D7G-CUBF> (last visited Jan. 24, 2013); *Fortis Institute in Palm Springs*, FORTIS, <http://perma.cc/P7T9-B6H4> (last visited Jan. 24, 2013); *Fortis*

college agreed to provide free retraining for former students and a \$600,000 payment into scholarship funds to end a deceptive marketing investigation by the Florida Attorney General.¹²⁰ Also in the last few years, two groups of students sued MedVance/Fortis in separate suits, alleging “fraud in the inducement, fraudulent misrepresentation,” “false statements regarding the quality of education, accreditation of Fortis, graduates’ preparedness to pass the required certification examination and job prospects upon graduation.”¹²¹ The courts dismissed the student suits due to arbitration clauses,¹²² though one court recognized that “there are serious questions about whether Plaintiffs received the benefit of their bargains.”¹²³ The student suits, in combination with the Florida Attorney General investigation and allegations in *Kaplan* that MedVance provided virtually no oversight of their internships,¹²⁴ at least suggest that MedVance/Fortis was willing to put its bottom line above quality education.

Despite the number of interns that pay for credit and the burden of that outlay, many colleges, by their own admission, fail to keep a close eye on internships.¹²⁵ While theoretically in the best position to figure out the caliber of an internship, the financial incentives to maintain a lax approval process call academic evaluation into question, and the relatively low contact rates confirm a lack of oversight. As long as schools gain from their assent to unpaid internships, administrative and judicial decision-makers interested in educational quality should not defer to schools’ assertions of value.

C. An Educational Inquiry Test

If the Division and courts cannot rely on the academy to determine the educational quality of unpaid internships, the administrators and judges must analyze quality themselves. Measuring educational value directly will produce results that better track the Division and the courts’ core interest. While administrators and judges perhaps lack specific training in measuring learning, the absence of a reliable third-party requires them to step into the fray. The Division should promulgate and the courts should adopt the following test to replace Fact Sheet #71.

Institute in Fort Lauderdale, FORTIS, <http://perma.cc/5J2Y-5MWK> (last visited Jan. 24, 2013); *Fortis Institute in Miami, Sunset Drive*, FORTIS, <http://perma.cc/6PWK-UHEZ> (last visited Jan. 24, 2013).

¹²⁰ Press Release, Florida Office of the Attorney General, Attorney General Bondi’s Office Reaches Agreement With MedVance Institute to Retrain Students and Donate \$600,000 to Florida Scholarships (June 13, 2012), available at <http://perma.cc/Z6QM-T66G>; Scott Travis, *Bondi settles with MedVance in for-profit probe*, SUNSENTINEL, June 14, 2012, <http://perma.cc/8LMQ-YR8N>.

¹²¹ *Asbell v. Educ. Affiliates, Inc.*, No. 3:12-cv-00579, slip op. at 1 (M.D. Tenn. Apr. 25, 2013); *Best v. Education Affiliates, Inc.*, 82 So.3d 143, 144 (Fla. Dist. Ct. App. 2012).

¹²² *Asbell*, No. 3:12-cv-00579, slip op. at 6; *Best*, 82 So.3d at 144.

¹²³ *Asbell*, No. 3:12-cv-00579, slip op. at 6.

¹²⁴ See, e.g., Appellants’ Consolidated Initial Brief, *Kaplan v. Code Blue Billing & Coding, Inc.* at 18, 504 Fed.Appx. 831 (11th Cir. 2013) (Nos. 12-12679-BB, 12-12011-BB, 12-12376-BB). (“MedVance provided no guidance to [the intern host] and made no efforts to ensure the [internships] were educational and consisted useful vocational training. Medvance provided no on-site supervision during the [internship].”).

¹²⁵ See *supra* Part I.C; see also Burke and Carton, *supra* note 64, at 129 (noting, seemingly from personal experience, that universities pass off internship oversight to faculty who provide little or no actual supervision); Ross Perlin, *Unpaid Interns, Complicit Colleges*, N.Y. Times, Apr. 2, 2011, <http://perma.cc/GGP6-U2Z4> (“[A]dvisers I spoke to flatly denied being able to “monitor and reassess” all placements or even postings...., their ability to visit students’ workplaces, for instance, is almost nil. They described feeling caught between the demands of employers and interns...”).

The test will help the Division and the courts carry out their assessments of educational value in line with the literature on internship design. In the pursuit of a valid and rigorous tool for educational assessment, every factor cites evidence from empirical studies on internship education.¹²⁶ The test's goal is to compel for-profit companies that offer unpaid, menial internships to either reform their internships into educational positions or pay their interns.

Educational Inquiry Test: An individual who interns at a for-profit entity and understands that she is not entitled to pay may be a trainee and not an employee under the Fair Labor Standards Act if the relationship between the intern and the host company is one of an instructor-learner. The determination of an instructor-learner relationship depends upon all of the facts and circumstances of the internship. The following criteria are highly relevant to the question of the instructor-learner relationship.

- 1) Duration: The internship lasts six months or less, irrespective of the number of hours worked. The company tailors the length of the internship to fit the quantity and difficulty of the skills taught.
- 2) Work
 - a. Challenging Projects: The intern works on projects that challenge the intern's skills.¹²⁷
 - b. Autonomy: The intern works independently at least some of the time.¹²⁸
 - c. Skill Variety: The intern uses a variety of different skills in her work.¹²⁹
 - d. Interpersonal Interaction: The intern works with a variety of people.¹³⁰

¹²⁶ The paper cites studies that show a correlation between an internship characteristic and intern satisfaction under the assumption that interns take internships to learn and that therefore the more satisfied the intern, the more educational the internship. In addition, the paper cites studies that show a correlation between an internship characteristic and intern perception of educational quality. Although neither measure is perfect, other measures are rare and no measure flawlessly calculates educational quality. The paper proceeds on the basis that empirical data, however unpolished, is more accurate than hunches as to what constitutes an educational internship. For a defense of student perception of educational quality, see Givelber et al., *supra* note 33, at 21-22.

¹²⁷ Caroline P. D'Abate et al., *Making the Most of an Internship: An Empirical Study of Internship Satisfaction*, 8 ACAD. MGMT. LEARNING & EVALUATION 527, 534 (2009) (finding students with projects that have a significant impact on the organization more likely to rate their internship highly); Marlene A. Dixon et al., *Challenge is Key: An Investigation of Affective Organizational Commitment in Undergraduate Interns*, 80 J. ED. FOR BUS. 172, 178 (2005) (finding "job challenge [among sports interns] held a significant, positive, and rather strong association with affective organizational commitment"); Miriam Rothman, *Lessons Learned: Advice to Employers From Interns*, 82 J. ED. FOR BUS. 140, 142 (2007).

¹²⁸ Daniel C. Feldman and Barton A. Weitz, *Summer Interns: Factors Contributing to Positive Developmental Experiences*, 37 J. OF VOCATIONAL BEHAV. 267, 279 (1990) (finding autonomy significantly correlated with job satisfaction, internal motivation and organizational commitment); Jaarsma et al., *supra* note 34, at 181 (finding "ability to work independently" highly prized among interns); M. Susan Taylor, *Effects of College Internships on Individual Participants*, 73 J. APPLIED PSYCHOL. 393, 399 (1988) (finding autonomy significantly related to ease of the school-work transition).

¹²⁹ Feldman and Weitz, *supra* note 128, at 279 (finding skill variety significantly correlated with intern job satisfaction).

¹³⁰ Linda Brooks et al., *The Relation of Career-Related Work or Internship Experiences to the Career Development of College Seniors*, 46 J. VOCATIONAL BEHAV. 332, 344 (1995) (finding dealing with others significantly correlated with self-perceptions of career efficacy); Feldman and Weitz, *supra* note 128, at

3) Supervision¹³¹ and Structure

- a. Formality: The intern takes part in a formal internship program with a structured training component.¹³²
- b. Expectations: The supervisor sets clear expectations.¹³³
- c. Access: The supervisor is accessible to the intern to solve problems and provide guidance.¹³⁴
- d. Feedback: The supervisor provides regular feedback on job performance to the intern.¹³⁵

An intern is a trainee and not an employee when, taken as a whole, the criteria above indicate an instructor-learner relationship. An intern's receipt of academic credit from an educational institution is not an educational benefit to the intern and is not evidence of an instructor-learner relationship between the intern and the host company.

In some cases, particular criteria will not be relevant to the determination of an instructor-learner relationship. For example, the level of interpersonal interaction may not be relevant to the educational quality of a research internship. The ultimate inquiry is for an instructor-learner relationship; the criteria are strong but not exclusive guides in that inquiry.

D. Educational Inquiry within the Legal Framework

The FLSA, by both its text and its legislative history, permits little administrative discretion over its terms. The Act contains no general rulemaking power; it permits the Division's Administrator or the Secretary of Labor to make regulations, orders or determinations only in specific instances.¹³⁶ The story of its drafting and passage is one

279 (finding dealing with others significantly correlated with intern job satisfaction, job involvement and organizational commitment).

¹³¹ Beard and Morton, *supra* note 33, at 50 (finding "quality of supervision is the most important single... variable" in predicting whether a journalism student will report a good internship experience); Jaarsma et al., *supra* note 34, at 182 ("[supervision] appears to be associated both with the quality of research reports and with overall satisfaction"). But Dixon et al., *supra* note 127 at 178 (finding supervisor support not significantly related to affective organizational commitment); Taylor, *supra* note 128, at 398 (finding supervision quality not significantly related to the ease of the school-work transition).

¹³² Feldman and Weitz, *supra* note 128, at 275, 280 (finding formal programs and structured training significantly correlated with intern job satisfaction and organizational commitment).

¹³³ Givelber et al., *supra* note 33, at 41 (finding law interns whose supervisors created and kept to agreements on expectations were more likely give their internships a high educational rating); Jaarsma et al., *supra* note 34, at 181 (2009) (noting that interns recommended employer improvement in "clarity of expectations").

¹³⁴ Givelber et al., *supra* note 33, at 41 (finding law interns who experienced repeated difficulty attempting to clarify a task were much more likely give their internships a low educational rating).

¹³⁵ Brooks et al., *supra* note 130, at 344 (1995) (finding feedback significantly related to self-concept crystallization and self-perception of career efficacy); D'Abate et al., *supra* note 127, at 534 (finding students who received feedback were more likely to rate their internship highly).

¹³⁶ See, e.g., 29 U.S.C. §211(d) (the Administrator may write regulations or orders "regulating, restricting, or prohibiting industrial homework... to prevent the circumvention or evasion of... the minimum wage rate"); 29 U.S.C. §212(d) (under the child labor section, "the Secretary may by regulation require employers to obtain from any employee proof of age").

of almost continuous cutback on administrative discretion in favor of rigid Congressional terms.¹³⁷ Under *United States v. Mead Corporation*,¹³⁸ the fact that Congress did not delegate “authority... generally to make rules carrying the force of law” in the Act means that an administrative interpretation of “employ” cannot earn *Chevron* deference, as the Act does not provide specific authority to the Administrator or the Secretary to interpret the word.¹³⁹ In *Skidmore v. Swift & Company*,¹⁴⁰ the Supreme Court decided that while the Administrator’s interpretation of the Act is not binding on a court, it is persuasive authority dependent “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹⁴¹ Therefore, the courts will only follow a new Division test if they find it persuasive within the legal and policy context of *Portland Terminal* and later administrative and judicial statements.¹⁴²

The educational inquiry test finds its roots in a fuller reading of *Portland Terminal* than that usually considered by the Division or the courts. *Portland Terminal* centered on the idea that a person who works under another’s “aid and instruction” for her own benefit is not an employee.¹⁴³ It noted that the FLSA did not compel “all instructors... [to] pay minimum wages to all learners.”¹⁴⁴ It underlined the educational process, in which the trainee “is turned over to a yard crew for instruction.... [where] he first learns the routine activities by observation, and is then gradually permitted to do actual work under close scrutiny.”¹⁴⁵ The Court compared the trainee’s gains favorably to those of students at vocational schools, noting that the FLSA should not deter organizations that provide free of charge vocational training for which students would otherwise have to pay tuition.¹⁴⁶

The six-factor test is a bright-line rule-based reading of *Portland Terminal*, one that only somewhat meshes with the opinion’s attempt to put educational relationships outside the strictures of the FLSA. The test consists of elements that the Court found useful but did not claim were necessary. For example, the most common evaluation under either the six-factor or the primary benefit test is a comparison of the parties’ benefits, a focus given weight by the six-factor test’s criteria on the trainee’s gain and the employer’s immediate advantage. The Court, however, never held up relative benefit as the essential yardstick; instead, the Court delved into the whole transaction and reasoned that Congress could not possibly have meant to place instructor-learner relationships, whether in a school or on the shop floor, under the purview of the FLSA.¹⁴⁷ Relative benefit is a clue to the relationship’s character, not a factor of standalone importance. *Portland Terminal*’s holistic examination is better conducted under the educational

¹³⁷ Grossman, *supra* note 38, at 25-28; John S. Forsythe, Note, *Legislative History of the Fair Labor Standards Act*, 6 LAW AND CONTEMP. PROBS. 464, 466-73 (1939).

¹³⁸ 533 U.S. 218 (2001).

¹³⁹ *Id.* at 226-27; 29 U.S.C. §203(g).

¹⁴⁰ 323 U.S. 134 (1944).

¹⁴¹ *Id.* at 139-40.

¹⁴² See *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 525 (6th Cir. 2011) (analyzing deferral to the six-factor test under *Skidmore*).

¹⁴³ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152-53 (1947).

¹⁴⁴ *Id.* at 152.

¹⁴⁵ *Id.* at 149.

¹⁴⁶ *Id.* at 153.

¹⁴⁷ *Id.* at 152-53.

inquiry test than through a sorting and weighing of each party's tangible and intangible benefits.

The Division and the courts, apart from *Portland Terminal*, should find the educational inquiry test persuasive under the *Skidmore* standard because it comports with the consistent driver of their decisions, educational value. The Division and the courts have always maintained that the educational value of an internship is key to the question of employment, but they have measured that value through a proxy — fitting at first glance but upon closer inspection biased and inattentive. The point of the educational inquiry test is not to radically reform unpaid internship law but instead to align the legal analysis with educational value. The result will be a more coherent regulatory scheme that better meets the interests of unpaid interns and decision-makers. The Division and the courts may welcome such a change.

E. An Approach, Not a Directive

The educational inquiry test is more useful for its approach than for its specific factors. The test asks the Division and courts to assess directly the educational value of an unpaid internship through the lens of evidence-based factors. The factors that define an instructor-learner relationship may vary over time, as research and theories of learning evolve and add to the Division's understanding. The basic principle of searching inquiry into educational value, however, is constant.

The main practical hindrance to the educational inquiry test is the lack of a firm line beyond which the intern is an employee. Internships come in all shapes and sizes, with varying degrees of challenge, structure, and feedback. With more than a half-dozen metrics against which to measure an internship, application of the test might be unpredictable or, worse, at the mercy of the decision-maker's biases. Many argue that if the Division is to adopt a new internship test, it should strive for one that sets a hard and fast distinction between employment and training.¹⁴⁸

The reform-oriented literature on unpaid internships shies away from direct evaluation of educational value.¹⁴⁹ This is not surprising: assessing educational quality is difficult; proxies and hardline tests are easier to handle. Yet *Portland Terminal* takes a comprehensive look at the educational program on offer exactly because measuring a single quantifiable factor does not do justice to the variety of ways instructors teach or students learn. To suggest measuring something other than educational value is not only contrary to *Portland Terminal*, but dismissive of the Division and the lower courts' driving concern in policing the trainee exception.

¹⁴⁸ See EDWARDS AND HERTEL-FERNANDEZ, *supra* note 36, at 4 (pitching a test under which the unpaid intern is an employee if the employer's financial benefit is greater than its financial cost); Yamada (2002), *supra* note 6, at 235 (submitting a test under which unpaid interns without an academic connection are employees if they "spend[] more time performing work that provides an economic benefit to the employer than participating in formal training programs"); Curiale, *supra* note 3, at 122 (proposing, under a mistaken view of the Division's formal rulemaking powers, a Division rulemaking to convert the six-factor test into an all-or-nothing test with *Chevron* deference); Durrant, *supra* note 36, at 187-88 (suggesting that an unpaid intern should be an employee whenever the employer seeks a present or future benefit from the intern).

¹⁴⁹ See EDWARDS AND HERTEL-FERNANDEZ, *supra* note 36, at 4; Yamada (2002), *supra* note 6, at 235; Curiale, *supra* note 3, at 122; Durrant, *supra* note 36, at 187-88.

The educational inquiry test will not produce perfectly predictable results, at least not in its first few cases. However, detailed factors make even balancing tests somewhat more consistent in their application.¹⁵⁰ The educational inquiry test attempts to make up for its lack of a precise line with an abundance of guidance on how the Division, courts, and employers should analyze internships. It keeps faith with *Portland Terminal*'s full consideration of the instructor-learner relationship while giving decision-makers tools to measure that relationship in a defensible way. Through case law and continued elaboration of the test, decision-makers will gain an instrument that both writes consistent decisions *and* takes educational value seriously.

CONCLUSION

This Note does not call for a change in the administrative and judicial attitude, but rather a change in analysis. The Division and the courts want to support educational programs that offer learning opportunities outside the classroom. In an attempt to transform that desire into a useful test, the decision-makers have leaned on schools, creating a doctrine in which unpaid internships affiliated with an educational institution receive far greater favor than standalone positions. However, in so leaning, the decision-makers have failed to take into account the incentive structures and oversight practices of schools, both of which dramatically undermine the wisdom of academic reliance. The recent internship cases of *Kaplan* and *Demayo* capture both the extent of courts' faith in scholastic judgment and the problems with that faith. The *Glatt* court stated that "[r]eceipt of academic credit is of little moment" under the New York minimum wage law, which may be true — but under the FLSA, it is of great moment. As long as academic endorsement holds pride of place, the law of unpaid internships will not reflect the educational goals that should be its foundation.

When allegations that unpaid internships aggravate inequality are given a more nuanced look, an unexpected picture arises, one that demands solutions other than either eradication of unpaid internships or the status quo. As with so many other issues, slow data aggregation and methodical examination produce better law and policy than polemics. As more numbers on the economics of internships trickle in and as researchers figure out the best ways to stimulate workplace learning, the Division and the courts must take care to mold a law of unpaid internships that facilitates, rather than hinders, equality of opportunity.

For unpaid internships will play no small part in the future of social mobility. Over one million college students intern before they graduate, over 60% of the total, and if history is any guide that number will rise. A college degree is less a mark of distinction than it used to be, so students seek additional qualifications to set them apart from their peers. If unpaid internships fail to provide the rigor and mastery necessary to catch an employer's notice, students may be forced to alternatives even less friendly to those with few means, graduate school among them.¹⁵¹ For the moment, employers say they want internships, and moderate-income students are responding in droves, even if unpaid. If

¹⁵⁰ See Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1278 (1975) (noting that the "more elaborate specification of the relevant factors may help to produce more principled and predictable decisions" in the application of a procedural Due Process balancing test).

¹⁵¹ See Yglesias, *supra* note 2.

the law can guarantee that those students gain the skills to compete, then unpaid internships will become a tool for social mobility.